

## Book Review\*

AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY. *Edited by* John Eekelaar and David Pearl. Oxford: Clarendon Press, and Japan: Nihon Kajo Publishing 1989.

Reviewed by  
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Even as mature economies are facing shortages of capital and labour, they are also being expected to do more and more. . . . Particularly as, looking ahead, the pressures are going to be for more spending, not less. In every OECD [Organisation for Economic Co-operation and Development] country the population is aging, which means larger bills for pensions and healthcare. In some countries, particularly America and Britain, the public infrastructure . . . is old and shabby. Pay for it with the 'peace dividend', cry many politicians.<sup>1</sup>

In addition to infrastructure, pensions and healthcare compete with education, the homeless, the environment, defence, etc.<sup>2</sup>

At the age of eighty my mother had her last bad fall, and after that her mind wandered free through time. Some days she went to weddings and funerals that had taken place half a century earlier. On others she presided over family dinners cooked on Sunday afternoons for children who were now gray with age. Through all this she lay in bed but moved across time, traveling among the dead decades with a speed and ease beyond the gift of physical science.<sup>3</sup>

*An Aging World* is a collection of 55 of the 80 papers<sup>4</sup> presented at the Sixth World Conference of the International Society on Family Law held in Tokyo in April of 1988.<sup>5</sup>

Suddenly, or so it seems, we are aware of the legal and financial problems of the elderly,<sup>6</sup> the easiest poor people to take—the deserving poor;<sup>7</sup> and dedi-

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1. *A Survey of Capitalism*, ECONOMIST, May 5, 1990 Vol. 315, at 6.

2. *Id.*

3. R. BAKER, *GROWING UP* I (1982).

4. When one looks at the list of authors it is a bit of "round up the usual suspects." And as usual the conferees seem to have done it.

5. AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY (J. Eekelaar & D. Pearl eds. 1989) [hereinafter AGING WORLD]. The book is published by Clarendon Press, Oxford and Nihon Kajo Publishing, Japan. I reviewed this book, in a different format in 4 INT'L J. OF L. & THE FAM. 343 (Oxford University Press 1990).

6. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1 (1989) [hereinafter, Dobris, *Medicaid Asset Planning*].

cated voters in Western countries.<sup>8</sup> The topic of the elderly has moved to the forefront, involving many disciplines and interests.<sup>9</sup>

It seems clear that the postmodern industrial state has a unitary set of problems insofar as old people are concerned just as developing states have a different set.

However, while it seems that law is a much used tool for elder rights in developed countries it does not matter that much in less developed nations. And it seems that personal wealth solves most of the nonhealth problems discussed in the book, making law somewhat irrelevant. And money, in truth in some way probably solves most of the health problems, too. At that point, of course, much of the discussion in this book is about allocation of societal resources to the nonwealthy in our world even though Eekelaar warns us that "[s]ocial justice cannot simply be 'bought.'"<sup>10</sup> And much of the law goes to questions that affect only those people with less than adequate resources. One doubts that the wealthy worry much about the local authorities taking their neglected grandchildren into care without a proper concern for their grandparental visitation rights.<sup>11</sup>

The elderly in America have a substantial amount of political power. I once read that when one grows old the only thing left to enjoy is power. To that I would add gambling for those retired from or never involved with the exercise of power.<sup>12</sup> As my research assistant on a prior article said, allocation of resources to the elderly may be the issue of the 90s.<sup>13</sup> I think he is right. If not, perhaps the issue is the allocation of power to the elderly rather than resources.

To read this book is to know that Family Law survives. Family Law thrives. Indeed, one might conclude there is no other form of law if one reads

7. Bonfield, *Was There a "Third Age" in the Preindustrial English Past? Some Evidence from the Law*, in *AGING WORLD* 37.

8. See Edsall, *The Return of Inequality*, *ATLANTIC*, June 1988, at 86, 94 ("The single most effective mechanism available in this country to advance broad economic interests is the voting booth, particularly for those who lack wealth, power, and access to the people making political decisions.").

9. For example, *AGING WORLD* contains works by law professors, demographers and economists.

10. Eekelaar, *Introduction*, in *AGING WORLD* 777, 780.

11. Lowe & Douglas, *The Grandparent-Grandchild Relationship in English Law*, in *AGING WORLD* 755.

12. M.F.K. Fisher has told us that even food no longer does it.

President Nixon is never more to be pitied than when he obediently cites Winston Churchill's reminder to Tito that it is power that keeps men young. Power doesn't. Local, parochial, and domestic attentions do. There is more true if unnoticed glory in storage facilities for fishermen than at the average summit. Elliot Richardson has found his happiness in small and local deeds, and Richard Nixon wanders lost in the cosmic.

(Kempson, *Lost in the Cosmic*, (Book Review) *N.Y. REV. OF BOOKS*, June 14, 1990 Vol.37 no. 26).

13. Steve Reynolds, U.C. Davis, School of Law, Class of 1990, working on Dobris, *Medicaid Asset Planning*, *supra* note 6. As Bonfield put it, it is "that competition between the generations for . . . the largess of the welfare state . . ." Bonfield, *supra* note 7, at 37-38. Indeed, as I have written elsewhere, "much of the work in this book is about a retirement cruise on the welfare ship of state — who travels first class, tourist class, steerage; are the deck chairs fairly distributed and which are in need of repair; which of the bars has the right atmosphere; is it really as bad down in steerage as they say?" See Dobris, Book Review, 4 *INT'L J. OF L. & THE FAM.* (Oxford University Press 1990). See generally, N. DANIELS, *AM I MY PARENTS' KEEPER?* (1988).

The issue has generated a proliferation of literature. The popular culture is interested, too. There is a steady supply of movies about old folks, witness *Cocoon*, the various George Burns movies, and *Driving Miss Daisy*.

certain publications.<sup>14</sup> Family Law now seeks to extend its dominion to include law and the elderly. That is, Family Law is expanding to include the law of old people. There it meets the explorers from the world of trusts and estates.<sup>15</sup>

As one reads this volume it is easy to conclude that elder law is an area that has so far survived deconstruction and thus is not in need of reconstruction. Colonizing theorists have not planted their imperial flags. Rather, the only strange vessels one sees are the ships of a few, friendly, under-employed trusts and estates traders who have reformed themselves out of business. They ply these waters.<sup>16</sup>

This book is a great source of ideas, an intriguing inventory of the problems facing old people.

Many ideas are considered over and over again. They include: what Laslett calls "the feminization of the elderly";<sup>17</sup> what he calls "the remarkable extent of widowhood . . .";<sup>18</sup> the moral, if not legal, liability of the middle aged for the elderly which Pearl encapsulates as the issue of "State care or family care";<sup>19</sup> the loneliness, of being old for many people (or more accurately and specifically many widows living alone); that well known phenomenon, the feminization of poverty; the various types and forms of the "new" family;<sup>20</sup> the dispersal of families within national borders;<sup>21</sup> the longer lives we lead;<sup>22</sup> the extended family; mental diseases of the elderly with Alzheimer's Disease heading the list;<sup>23</sup>

14. See, e.g., the publications surveyed in the *Michigan Law Review 1988 Survey of Books Relating to the Law*, 86 MICH. L. REV. 1067 (1988).

15. See Simon, *Estate Planning and Resource Maximization for the Elderly: Medicaid Considerations*, 25 N.H. BAR J. 101 (1984).

16. I am a prime example of that, having recently written about the family, see Dobris, *The Modern Family Fragmented or Don't Let Your Children Grow Up to be Lawyers*, 22 U.C. DAVIS L. REV. 691 (1989) and about law and the elderly, see Dobris, *Medicaid Asset Planning*, *supra* note 6. Put differently, Law and the Elderly is a growth issue. Family law and trusts and estates professors are buying in at a rapid rate. Pension law is enjoying somewhat similar growth.

17. Laslett, *The demographic scene—an overview*, in AGING WORLD 1, 7.

18. *Id.* at 15.

19. Pearl, *Introduction*, in AGING WORLD 23, 24.

20. Discussions of definitions of the "new" family in everyday contexts illustrate how much the world has changed in the last thirty years. See, e.g., Bainham, *Shared Living Among the Elderly: A Legal Problem in Search of a Home*, in AGING WORLD 427; Lowe & Douglas, *supra* note 11; Hoerl, *Family, Society, and the Elderly: The Vienna Case*, in AGING WORLD 169; Lund-Andersen & Munck, *The Situation of Elderly Cohabitees in Denmark — The Interaction of Family Law, Social Law, Tax Law and the Law of Succession*, in AGING WORLD 443; Pask, *The Effect of Family Breakdown on Retirement Planning*, in AGING WORLD 855. Indeed, it becomes necessary in our new world to define grandparents to provide properly for grandparents' rights. Upon reflection this is not a surprise, but one's first reaction might well be that we all know who a grandparent is. Lowe & Douglas, *supra* note 11, at 757-59. See generally M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

21. Paillat, *Recent and Predictable Population Trends in Developed Countries*, in AGING WORLD 25.

22. Thomson, *The Elderly in an Urban-Industrial Society: England, 1750 to the Present*, in AGING WORLD

55. The following quote captures the flavor of the change in life expectancy quite well:

It was a time, remember, when rich men expected to die in their fifties and accordingly retired at forty to live it up a little before the end came. Sixty was then the rather late, but compulsory, retiring age of all civil servants. But when McLaren got there the people of San Francisco insisted that he stay on. And when he was seventy, they insisted again. After that he was given a perennial waiver of retirement. And he died, still the superintendent of the park, at the age of ninety-five, in 1943.

A COOKE, "TALK ABOUT AMERICA, 1951-1968" 274 (Alfred A. Knopf ed. 1968).

23. Shone, *Civil Commitment of the Elderly: Is There a Case for Special Legislation?* in AGING WORLD 571.

the role of women who work within the home; women who are middle-aged taking care of old women;<sup>24</sup> the loss of inheritance that people feel will follow parents or grandparents needing a great deal of expensive care;<sup>25</sup> intergenerational conflict; the alleged duty to support parents;<sup>26</sup> the effect of change on old people;<sup>27</sup> the lore of who is caring for the elderly if government is not; the favorable "position . . . [of the elderly] in traditional [premodern and precolonial and presocialist] societies";<sup>28</sup> aging populations in all nations;<sup>29</sup> the inadequacy of old people's income in developing nations and the crumbling of customs that would have safeguarded them; the psychological and financial consequences of home care of older relatives on the family; the shrinking pool of available caregivers (demographic projections suggest we will run out of younger relatives to take care of older ones and common sense suggests that we have, and will have, fewer people (read women) staying home to provide unpaid care);<sup>30</sup> the growth in the number of "generations [found] within the family";<sup>31</sup> the swift decay of "the traditional family structure,"<sup>32</sup> notably in developing nations including, even, to a degree, in Japan;<sup>33</sup> the extraordinary transformations in third world societies in modern times;<sup>34</sup> the continual integration of women into the workforce; the integration of indigenous and state welfare systems for old people;<sup>35</sup> the results of intra-national migrations including young people moving from rural places to cities, city workers following jobs<sup>36</sup> and retirees moving to retirement areas; the personal problems of the family caregiver and the problems her caregiver role imposes on her own family; the "availability

24. Ogawa, *Population Aging and Household Structural Change in Japan*, in AGING WORLD 75.

25. Dobris, *Divestment of Assets to Qualify for Medicaid: Artificial Pauperization to Qualify for Nursing Home and Home Care Benefits*, in AGING WORLD 791.

26. Thomson, *supra* note 22, at 56-57.

27. Rwezaura, *Changing Community Obligations to the Elderly in Contemporary Africa*, in AGING WORLD 113.

28. Mladenovic, *The Family and Old People in Yugoslavia and Some Other Socialist Countries*, in AGING WORLD 145, 146.

29. *Id.* at 145.

30. One reads this volume and often thinks that institutionalization and drugging of the elderly must often appeal to administrators and professionals in industrialized countries. It is efficient and easy compared to more attractive and humane solutions. In other words, there is a disjunction between the strong desire for home care (often expensive unless provided "for free" by the family) and more efficient care in institutions. I was struck that what we all want in terms of physical resources, due process, dignity, "autonomy, privacy, control, and choice" (Wardle, *Suicide Among the Elderly: A Family Perspective*, in AGING WORLD 683, 687) are incredibly expensive for a society and so hard to save for as an individual. We all want elder law and care that is "thoughtful, sensitive and flexible." Creyke, *Guardianship: Protection and Autonomy—Has the Right Balance Been Achieved?*, in AGING WORLD 545, 562) and expensive. And today's youth have to wonder: Who will take care of me—and how? I know I do.

31. Hoerl, *supra* note 20, at 170. Perhaps the most depressing moment of all for me was reading of "the young elderly, aged 55-64" in Wardle's chapter. Wardle, *supra* note 30, at 685. As the "author" in *The New Yorker* cartoon says to his "editor," "I write for the age group thirty-seven to forty-six." THE NEW YORKER, Aug. 28, 1989 at 39.

32. Ninomiya, *Welfare and Support for the Elderly in the Community*, in AGING WORLD 185, 189.

33. Maeda, *Decline of Family Care and The Development of Public Services—a sociological analysis of the Japanese experience*, in AGING WORLD 297.

34. Sittitrai, *Social Support Systems for the Elderly in Rural North Thailand*, in AGING WORLD 193.

35. Hampson, *Social Support for Rural Elderly in Zimbabwe: The Transition*, in AGING WORLD 201, 204.

36. Maeda, *supra* note 33, at 307.

of nursing homes";<sup>37</sup> the growth in the use of "government agencies . . . to provide and pay for services . . . needed by older persons";<sup>38</sup> the "shifts of power and resources between age-groups at the end of the twentieth century";<sup>39</sup> the puzzle: "When is one old?";<sup>40</sup> the significance of friendships if older people are to thrive;<sup>41</sup> various theoretical bases for securing the place of the elderly; "the elderly's loss of social standing and of utility";<sup>42</sup> the dependency of so many of the elderly and their loss of "independence and control";<sup>43</sup> the under-supply of nursing home beds in developed nations;<sup>44</sup> the nature of old people's lives, especially the so-called frail elderly;<sup>45</sup> "non-institutionalization, de-institutionalization and privatization as the preferred methods of providing care and treatment" in the post-modern industrial welfare state;<sup>46</sup> problems of efficiency in various contexts including caring for the frail elderly and providing high caliber guardianship services;<sup>47</sup> budgetary, economic, and social reforms of public retirement schemes in developed states<sup>48</sup> for many reasons including the need for clarity and simplicity;<sup>49</sup> the lessening in poverty among old people in devel-

37. *Id.* at 309.

38. Levine, *The Role of the Law*, in AGING WORLD 321, 326.

39. Thomson, *supra* note 22, at 370. A more "civilized" and gender neutral version of the elderly men controlling the local economy via bridewealth and associated customs.

40. Graycar, *Protecting the Legal Rights of Older People: State Government Initiatives in Australia*, in AGING WORLD 401, 403. My in-laws, retired to Florida, always referred to "the old people." As the in-laws grew older so did "the old people." There comes a time when the old people are mighty old.

41. Bainham, *supra* note 20. This chapter is a sobering piece of reading for a middle-aged, middle-class person. It makes you want to put your house in order. If having friends is such an important amenity in old age perhaps one ought to start being nicer to people, younger people at that.

42. Dickens, *Medico-Legal Issues Concerning the Elderly—An Overview*, in AGING WORLD 487, 492

43. Creyke, *supra* note 30, at 547.

44. See Graversen & Pedersen, *Loss of Power of Speech—Does it Mean Loss of Civil Rights*, in AGING WORLD 531. Aids patients compete with the elderly for public health resources and beds in many places. See AIDS Fear: How a Nurse Battles Hers, N.Y. Times, July 8, 1988, § B, at 1, col. 1 (Late City Final ed.).

45. Graversen & Pedersen, *supra* note 44.

46. Hughes, *Personal Guardianship and the Elderly in the Canadian Common Law Provinces: An Overview of the Law and Charter Implications*, in AGING WORLD 617, 619; Pask, *supra* note 20. Sensible people want to qualify for the minimum Social Security retirement benefit and then have a private, indexed pension that cannot be taken away from them under any reasonable circumstances. An alternative dream is a government pension under the plan for the local legislators in a prosperous jurisdiction. The power to tax is the power to fund that pension. The legislators take care of themselves. Employees of some universities, nonprofits and governments are not covered by Social Security. They often take part time work to get the necessary forty quarters coverage. Owners of small businesses usually dream of lavish pension plans for themselves with deductible contributions for their workers who receive no benefits at the end of the day. The classic way to achieve this is to have a number of part time workers who do not work enough to qualify for a vested pension benefit.

I have always been interested by the phenomenon of double and triple dippers—people who work for twenty years for one government, qualify for a pension and retire, then work for another government for twenty years, qualify for a pension and retire, and sometimes, taking advantage of anti-age discrimination rules or having begun work at a very early age, go on to work for yet another government before finally really retiring.

47. Creyke chronicles how expert medical testimony about incapacity (seemingly expensive) has given way to testimony from paramedicals, social workers, family caregivers and the like. See Creyke, *supra* note 30, at 557.

However, it may be that physician certifications may be no more expensive nor provide caring than the one feared in the movie *A Private Function* (Filmex 1985). On the citation of movies I can only approximately quote the anonymous professor I overheard dismissing the lecture of a famous visitor. "Just a strung together series of allusions to popular movies. I went to Dillons and looked in the index to his book and he didn't cite me so I didn't have time to read it."

48. Holtzmann, *Pension Policies in the OECD Countries: Background and Trends*, in AGING WORLD 821.

49. Nielsen & Vindelov, *Support of the Elderly in Denmark: The Pension System—Its Problems and Challenges*, in AGING WORLD 845.

oped nations;<sup>50</sup> the effect of the baby-boom generation on public pensions and social welfare schemes in developed countries;<sup>51</sup> twenty-first century pension problems in industrialized countries including the demographic economics in the future of smaller numbers of working people paying the pensions of larger numbers of pensioners in public retirement schemes;<sup>52</sup> the political, social and economic dilemmas implicit in such reform (as they say, Social Security is the Third Rail of American politics—touch it and you die); and the desire that government old-age pensions in developed nations do many jobs, among other things, assuring old age, nurturing economic progress, and supplying distributational justice.<sup>53</sup>

There was also discussion of: discrediting the notion that seventeenth century families in Britain had to maintain their older relatives<sup>54</sup>—indeed, to the extent it happened, it happened in the late nineteenth century;<sup>55</sup> the assignment of the “‘re-privatisation’ of support tasks” to “the fiscal crisis of the welfare state” and the conclusion there “is no solution in a policy based on encouraging even more informal support by the kinship system . . .”;<sup>56</sup> the administration of welfare programs and the application of program standards to defacto diminish the number of effective applications for pensions and other forms of assistance; grandparents raising grandchildren;<sup>57</sup> the interrelationship among “social insurance, public assistance, family responsibility and personal assets”;<sup>58</sup> discrimination against the aged;<sup>59</sup> forced retirement;<sup>60</sup> the great contrast between first world and third world problems in some quarters<sup>61</sup> and the great similarity in others; the rights of the elderly as a separate group in the body politic;<sup>62</sup> the contest for welfare between the old and customary, normally younger, recipients;<sup>63</sup> the speed-up of retirement in developed countries with all that implies

50. Holtzmann, *supra* note 48.

51. *Id.*

52. Nielsen & Vindelov, *supra* note 49.

53. *Id.*

54. Thomson, *supra* note 22. As Freeman said, “We must put mythology aside . . . .” Freeman, *The Abuse of the Elderly—Legal Responses in England*, in AGING WORLD 741, 743.

55. Thomson, *supra* note 22, at 59.

56. Hoerl, *supra* note 20, at 171.

57. Burman, *Law Versus Reality: The Interaction of Community Obligation to and by the Black Elderly in South Africa*, in AGING WORLD 211.

58. Gunn, *The Development of Laws Relating to Filial Support in Australia*, in AGING WORLD 237 (quoting Garrett).

59. London, *The Canadian Experience in Mandatory Retirement: A Human Rights Perspective*, in AGING WORLD 329. No mandatory retirement at a given age is pro-female because it is women who are likelier to have entered the workforce later or to have had their employment interrupted. They also are likely to have been paid less than men. Thus they may be more in need of additional earnings or job satisfaction than men of the same age. Some of this applies to minorities as well. Mandatory retirement at a given age is to be distinguished from mandatory retirement after a given number of years of service without regard to age. Fair and rational exams to get and keep jobs will theoretically aid nontraditional hires and older people wanting to keep demanding jobs. The sixty year old fire fighter who does not want to retire should be willing to take and pass a fair and rational test. Query if the sixty year old applicant for the job presents the same question. Of course, law professors should be allowed to work as long as they want.

60. *Id.* Guillemard, *Old Age Policies in Developed Western Countries and their Implications for the Status of the Elderly*, in AGING WORLD 363.

61. Eckelaar, *supra* note 9.

62. Graycar, *supra* note 40.

63. Dobris, *supra* note 25; Guillemard, *supra* note 60.

for the newly old;<sup>64</sup> negatively changing duties of the young towards the old;<sup>65</sup> imbalance of the relationship between the young and the old;<sup>66</sup> a disproportionate number of women in the population of elderly;<sup>67</sup> "a very diffuse elderly population,"<sup>68</sup> spread across thirty or forty years of life, differentiated by age, sex, class, ethnicity, location, and health status;<sup>69</sup> the defenselessness of the old;<sup>70</sup> the female low pay workforce that provides much of the eldercare in industrialized nations;<sup>71</sup> the financial, tax and social security disincentives to older cohabitantes marrying, contrasted with the rewards of being a widow or widower;<sup>72</sup> protection of older people—who are particularly vulnerable as consumers;<sup>73</sup> legal services for the elderly;<sup>74</sup> the doctor-patient relationship in a law and elderly context;<sup>75</sup> the legalities of commitment of older people to institutions;<sup>76</sup> living wills;<sup>77</sup> durable powers of attorney; the legal difficulties related to legal incapacity<sup>78</sup> and guardianships of the person and property; ending life by ending medical exertions, euthanasia and suicide;<sup>79</sup> abuse of old people;<sup>80</sup> the rights of grandparents vis-a-vis their grandchildren, especially grandparent visitation rights;<sup>81</sup> elderly self-neglect;<sup>82</sup> the pain of circumstances forcing you out of your

64. Guillemard, *supra* note 60.

65. Thomson, *supra* note 22.

66. *Id.*

67. See Dobris, *supra* note 25; Graycar, *supra* note 40.

68. Graycar, *supra* note 40, at 401.

69. Large populations of first world elderly enjoy relative good health and prosperity. See *id.* at 402; Holtzmann, *supra* note 48, at 827. Their main problems are fear of the future (especially what their health will be, and what it will cost for long-term care) and in the present, lack of respect. See Dobris, *supra* note 25; Graycar, *supra* note 40. Their main concerns are life style questions.

In other words: "You're past the age when people get these horrible diseases; you're one of the few lucky ones who're going to die a really natural death. . . . Nothing really wrong with him — only anno domini, but that's the most fatal complaint of all, in the end." J. HILTON, *GOODBYE MR. CHIPS* 5 (1938 Little, Brown and Co. ed.)

"And now, fifteen years after that, he could look back upon it all with a deep and sumptuous tranquillity. He was not ill, of course—only a little tired at times, and bad with his breathing during the winter months." *Id.* at 105.

It is easy to forget and think of the elderly as a monolithic mass. What that mass consists of depends on who the thinker is. They are all poor. See Coleman, *The Delivery of Legal Assistance to the Elderly in the United States*, in *AGING WORLD* 463. They are all petite bourgeois people of too great prosperity. They are all vulnerable. Et cetera, et cetera, et cetera. Of course, there is an infinity of varieties of age, health, social class and the like. To think of them as all of a kind leads to problems.

70. See Graycar, *supra* note 40. However, the relative lack of discussion of the vulnerability of the elderly struck me as "proof" of their new prosperity or of the new perception of their prosperity.

71. See Frost, *The Law as an Instrument for Democracy and Welfare in Danish Elder Policy*, in *AGING WORLD* 415.

72. See Lund-Andersen & Munck, *supra* note 20.

73. Reyes, *Legal Protection of Elderly Consumers in the Philippines*, in *AGING WORLD* 453.

74. See Coleman, *supra* note 69. People who may have needed little in the way of legal services may need more as they grow older and more dependent on private and public bureaucracies and programs. Poor people who are old may be especially needy in this regard. There is a multiplier effect. See generally *id.*

75. Dickens, *supra* note 42.

76. See Hoggett, *The Elderly Mentally-Ill and Infirm: Procedures for Civil Commitment and Guardianship*, in *AGING WORLD* 517.

77. Rosettenstein, *Living Wills in the United States: The Role of the Family*, in *AGING WORLD* 653.

78. See Hoggett, *supra* note 76.

79. See Dickens, *supra* note 42; Rood de Boer, *The Problem of Euthanasia in the Netherlands*, in *AGING WORLD* 675; Wardle, *supra* note 30.

80. Freeman, *supra* note 54.

81. See Lowe & Douglas, *supra* note 11.

82. See Hoggett, *supra* note 76.

own home in old age;<sup>83</sup> the following forecasts, "First, the demand for mental health resources will increase in Canada, the United States and the United Kingdom over the next four decades. Second, the incidence of hospitalizations for mental illness will rise. Third, the incidence of civil commitment of mentally ill elderly persons will also increase";<sup>84</sup> the burdensome procedures of the welfare ministries which disburse benefits to the elderly;<sup>85</sup> the rise in the number of people becoming parents later in life, even without regard to late twentieth and twenty-first century technology (women because of postponing childbirth and men because of postponing the siring of children and because of second and third marriages to younger women);<sup>86</sup> "alternative living arrangements" for older people;<sup>87</sup> the transaction costs of the legal proceedings in developed nations meant to safeguard the rights of older people; the use of and expectations about the middle-class inheritance<sup>88</sup> and the allied problem of the "role of the resources of the elderly in pension policy";<sup>89</sup> and the yet again allied problem of the pursuit of methods of unlocking the assets of the elderly, before they die, while still assuring their retirement, "anticipated succession" as it has been labelled;<sup>90</sup> pension equity for women in response to inequities resulting from various problems including devaluation of the traditional female role in marriage, divorce, and lower labor and capital income<sup>91</sup> and the more general question of

83. See Dobris, *supra* note 25; Graversen & Pedersen, *supra* note 44; Schulte, *Reform of Guardianship Laws in Europe - A Comparative and Interdisciplinary Approach*, in AGING WORLD 591.

84. Shone, *supra* note 23, at 572.

85. See Zenz, *The End of Guardianship for the Elderly? Facts and Objectives in Current Discussions on the Proposed Reform Legislation in the Federal Republic of Germany*, in AGING WORLD 609.

86. See Rubellin-Devichi, *Elderly People and Assisted Conception*, in AGING WORLD 729. We are much readier to see an older man with a younger woman than a older woman with a younger man.

Older parents mean more minor orphans, younger children to care for elderly parents, more disappointed and disinherited children of early marriages. For a catalog of the current science fiction options for assisted contraception, see *id.*

87. Freeman, *supra* note 54, at 744; See Bainham, *supra* note 20. Bainham discusses the legal problems of "elderly people living together under informal arrangements" and, more specifically, unrelated old people in England who create nontraditional households that cannot be approximated to marriages. As he describes it, the British courts are particularly formalistic and cruel. I think a partial preventative law solution lies in "regimes" of contracts, wills and the like. The publication of model contracts, leases and will provisions could solve some of the types of problems discussed by Bainham (e.g., what if the tenant dies and the "roomer" is left without a place to live?). This type of thing also arises in other fact situations—such as that of unmarried couples. These regimes could be published by commercial publishers such as Nolo Press or in statutes or in law review articles perhaps written by advanced student seminars or in monographs promulgated by nonprofit publishers. Short term, I believe there are a number of small scale solutions to the problems of elderly lives that are very interesting and very much deserving of consideration, that do not promise large scale solutions at this time. I would put nontraditional, nonfamilial home sharing in that category.

88. See Danielsén, *The Surviving Spouse: Inheritance and Undivided Matrimonial Property in Scandinavian Law*, in AGING WORLD 783; Dobris, *supra* note 25; Eekelaar, *supra* note 10; Verschraegen, *Non-State Contributions from Third Parties or Spouses to the Family Unit—The Provisions of the Austrian, German and Swiss Civil Codes*, in AGING WORLD 805.

89. Eekelaar, *supra* note 88, at 778; See Holtzmann, *supra* note 48; Nielsen & Vindelov, *supra* note 49.

90. Verschraegen, *supra* note 88, at 809. See Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

91. See Frank, *Providing for the Surviving Spouse Under the German Law of Social Security*, in AGING WORLD 873; Pask, *The Effect of Family Breakdown on Retirement Planning*, in AGING WORLD 855. Pask makes it clear why nonparticipant spouses of plan participants with significant pension benefits are wise, in North America, to hire skilled divorce lawyers and forensic actuaries. *Id.* at 864-65.

If old people are induced to go against their nature and be less risk averse, then their total return should theoretically increase and they should require less labor earnings and transfer income. *Cf.* Holtzmann, *supra* note



government pension systems as tools for redistributing wealth; the supplementary effect of the disability pension;<sup>92</sup> the "creative bookkeeping" of transferring recipients from the payroll, the unemployment roll, or in Scandinavia<sup>93</sup> the disability roll to the pension roll; lurking somewhere in these pages is the issue, what is the "appropriate" life style for the middle-class elderly in retirement — is it to be a continuation of "one's present life-style,"<sup>94</sup> a more frugal and "decorous" life-style<sup>95</sup> or a hard won, old people's riot of bus tours to high stakes bingo parlors; a state income for old people regardless of occupational history;<sup>96</sup> a concern that state old-age pensions are creating distributional inequities;<sup>97</sup> pension rights of cohabitants;<sup>98</sup> the infinity of pension problems that exist in developing nations including "[o]nly a minority of the population, i.e., those who are employed in the formal sector, benefit from . . . old-age security schemes. . . . Self-employed, casual, unpaid and family workers and the rural population on a whole, fall outside these schemes"<sup>99</sup>—in third world countries, it may be that most of the formal pensions are for civil and military government employees<sup>100</sup> and employees of multinationals that provide pensions; and "the organisational difficulties which pensioners face when they try to get the pension benefits to which they are entitled"<sup>101</sup> in such countries; and rights to forgo treatment and to an early death.<sup>102</sup>

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48, at 836. Indeed, this is an argument for public intervention in the financial planning business because superior investment advice looking to retirement would reduce the need for transfer income. *Cf. id.* at 839. Presumably, ERISA, with its emphasis on Modern Portfolio Theory, has had that effect as well.

Nielsen and Vindelov raise a point I had never run across before — there may be people who want no pension at all. Nielsen & Vindelov, *supra* note 49, at 851. This is easy to understand if the reluctant pensioner is being forced to save his own money (or allocate some of it for his widow) but it is a novel idea if the pension comes from taxes and the refusal is personal rather than philosophical. We all are ready to get something for nothing and we all feel we have paid in more taxes than we get out of the system. It is only right that the government should give us a free pension.

92. See Westerhall, *Disability Pensioning and the Elderly: An Analysis of Legal Rules and Their Application in Sweden with Regard to Early Retirement*, in AGING WORLD 887.

93. See *id.* This is the other side of the "one more job 'til Social Security" coin.

94. Verschraegen, *supra* note 88, at 811.

95. "A pleasant, placid life, at Mrs. Wickett's. He had no worries; his pension was adequate, and there was a little money saved up besides. He could afford everything and anything he wanted. His room was furnished simply . . ." J. HILTON, *supra* note 69, at 19. Historically and culturally, it has been a given that the retired live frugally. This seems to be changing in America. This both creates and solves problems. Often, where there is a second marriage less money is given to adult children while the retired parents are still alive. More money is spent on consumption by the retired instead of consumption by the young.

In a similar vein, I note that seniors are contributing mightily to the budget section of the travel industry.

96. See Nielsen & Vindelov, *supra* note 49. It might be cheaper to give all old people who need it nursing home care than to give every old person an income.

97. See *id.*

98. Perhaps, just as we need portable pension rights for workers who never stay in one job long enough to get a vested pension right we also need portable "pension credit-splitting" rights among cohabitants. *Cf. Pask supra* note 20, at 862. One could register relationships for these purposes. As they say, the computer can do anything. I feel obliged to note that I believe this footnote was written whilst under the influence of Lytton Strachey's *Eminent Victorians*. L. STRACHEY, *EMINENT VICTORIANS* (Garden City Publishing ed. 1918).

This is one of the many issues that makes one wonder if women should have access to some security as an entitlement unrelated to their marital status or financial status.

99. Wanitzek, *State Provisions for Old-Age Security in Tanzania*, in AGING WORLD 899, 899-900.

100. *Id.*

101. *Id.* at 903. Once again, South Africa is everyone's favorite villain. The description of what South African blacks must endure to obtain pensions makes the American reader very unhappy. See Burman, *supra* note 57.

102. See Graycar, *supra* note 40.

Ideas referred to briefly include: "[c]ommercial welfare services";<sup>103</sup> the question of the free rider if the cost of taking care of all old people is born by government—how do we continue to get people to provide free care to relatives if the state is to take over the burden of care for the elderly, and how do we get the elderly to continue to muddle through at no or low cost when subsidized or free services are available;<sup>104</sup> the situation of the hearthside child,<sup>105</sup> usually a daughter, who ends up caring for the elderly parent(s); respite care;<sup>106</sup> the rationing of health care;<sup>107</sup> "current debates among legal scholars";<sup>108</sup> a discussion of the problems that cause people (read women) to enter nursing homes—"dementia, immobility, and incontinence";<sup>109</sup> the great expansion of private pension law (which tends to be off the turf of the typical family law teacher);<sup>110</sup> the desire of the elderly and their families to keep the old person at home; the essentially taboo topic of sex between old people;<sup>111</sup> the often all too brief feeling of freedom that healthy, prosperous, middle-class retirees feel in industrialized nations—no boss,<sup>112</sup> no landlord, no dependents and an indexed<sup>113</sup>

103. Ninomiya, *supra* note 32, at 189. Commercial social services are also mentioned by Bainham, *supra* note 20, at 427, and Hoggett, *supra* note 76, at 523, who writes of, "The advent of a flourishing private sector relying partly on State payments and partly upon the modest wealth of middle and lower middle class people . . . ." *Id.* "Commercial welfare services" are springing up in the U.S. for the middle and upper middle class (such as retirement communities, consulting social workers and the like). I discuss these in more detail in Dobris, *Medicaid Asset Planning by the Elderly*, *supra* note 6.

Long-term I think there will be interesting legal questions arising from issues of tenants' rights in retirement villages both as short-term tenants, life tenants and fee owners. There are the "security of tenure" questions. Graycar, *supra* note 40, at 408. One wonders how long retirement villages that eject the wheelchair bound will be allowed to continue to do so. The effect of bankruptcies raises interesting issues. There are interesting running covenants questions, especially when a developer who has gone bankrupt has promised care to tenants or fee owners. If Developer A builds Happytowne and promises the world to the old folks who live there and cannot produce because he has chosen the wrong location, can Investor B buy the building and use it for its more "natural" use — let us say housing for singles? *See id.* at 407.

104. *See* Maeda, *supra* note 33, at 311.

105. *Id.* In the author's family the hearthside child has an MBA and she has moved to Paris. Thus the new world. One of the explanations for copyhold with its inheritance by the youngest child, as opposed to freehold, with its inheritance by the oldest was to assure the future of the hearthside child. One of the more ribald explanations, a wrong one, was to assure the heir was sired by the decedent.

106. *See id.*

107. *See* Levine, *supra* note 38.

108. *Id.* at 324. *See also*, Frost, *supra* note 71. Current debates that seem relevant to me include some kind of practical or applied feminism, and anything that takes into account social class and resource allocation.

Although modern and up-to-date I would not call this book postmodern. It does not demonstrate the requisite modernity and familiarity with the more philosophical works and diction that are currently in vogue in legal education. That is fine with me.

109. Graycar, *supra* note 40, at 403.

110. Private pension law is just getting off the ground in the United Kingdom.

111. *See* Graversen & Pedersen, *supra* note 44, at 541.

112. The feeling is not limited to the middle class:

"But after all, life begins at sixty-five."

....

"It's for different reasons entirely that my life began at sixty-five. That was when I qualified."

"Qualified for what? Voting?"

"Qualified for the old age pension, son. Ever since then I've been my own boss. No more getting pushed around, no more licking asses, not for me! Nobody can't take that pension away from me."

"It's a great thing," I said.

....

"It's a wonderful thing. It's the most wonderful thing that ever happened to me in my life."

pension<sup>114</sup> (not to mention the middle-aged concern about whether one will actually get to that safe harbor); the complexity of calculation a middle-class person in an industrial country faces at retirement, especially if she is a government employee;<sup>115</sup> the problem of "one more job until I qualify for Social Security."<sup>116</sup> There was nothing much about nursing homes as such, although most chapters had passing references to them and the idea of the nursing home overhung virtually every chapter.

Very few ideas are missing from this volume.<sup>117</sup> This is commendable given the great expense of going to Japan to present a paper. Despite the generosity of spirit and resources shown by the Convenor, Professor Shimasu, and his institutional sponsors, some potential participants could not attend. Japan was, however, for many reasons a most appropriate venue for the conference, having, as it does, the "population . . . likely to become the world's most aged human population in the early part of the next century."<sup>118</sup>

I was struck by a number of things as I went through this book. A few of them are as follows.

In dealing with many of the more exotic or "new-worldian" ideas discussed one is struck by how hard it is to tell how many people are actually affected by the problem or how many take the problem to law. Thus in Douglas & Lowe's article on grandparent rights in divorce they suggest that it may be that these issues do not come up often in practice.<sup>119</sup>

There is a dissonant tension in the book as to whether old age is the delightful freedom from work or the dreadful inability to work.<sup>120</sup> As was once said, "There is a great difference between theory and practice."<sup>121</sup> One's impression is that the theorists speak of being deprived of work while the typical older person looks forward to not working. In industrial nations I assume there is a small population of people (often prosperous) who emotionally need to work and that many people in industrial nations would like to feel they could con-

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"Can you imagine what they did to me?" the old man said. "And that was when I couldn't walk yet after my second stroke. They put me out in the county poorhouse, with nobody to look after me except my chums out there. They said all the hospitals were full. I still have some of the bedsores I got then. And then they weren't going to give me my old-age pension, even after I qualified."

.....

"Now I got me a little place of my own under the stairs at the warehouse, and nobody can say boo to me."

R MACDONALD, *BLUE CITY* 8-10 (Alfred A. Knopf ed. 1947).

113. There is indexing and there is indexing. See Holtzmann, *supra* note 48, at 836.

114. The worst expression of the idea is the camper on an interstate highway with the sticker that says "I'm spending my kids' inheritance" (a hostile thought think I) and the less offensive version is the same camper with a different sticker—"Happiness is being a grandparent."

115. See Nielsen & Vindelov, *supra* note 49.

116. To read this book is to be sad at what awaits so many of us and glad at what so many of us have managed to escape, at least temporarily.

117. One thing missing is there is little in the volume about the state of the elderly in the newly industrializing countries of Asia. Another is the urge to charitable giving as one grows older or in one's will.

118. Ogawa, *supra* note 24, at 84.

119. See Lowe & Douglas, *supra* note 11.

120. See Gec-Korosec, *The Elderly in Labour and Education Law in Yugoslavia*, in *AGING WORLD* 389.

121. "'There is a great difference,' said his Eminence [Cardinal Antonelli to the Austrian Ambassador], 'between theory and practice.'" L. STRACHEY, *supra* note 98, at 108.

tinue to work if they wanted to, which they do not, and there are people who financially need to work as long as possible in all countries.<sup>122</sup>

Every law school library should have this book. It seems legitimate to suggest its use as a learned desk book for those seeking the latest word, although perhaps not the latest fashion, to identify what is occurring in family law at the introductory and expert, applied and theoretical levels.<sup>123</sup> There is something here for the scholar and the practitioner, the generalist and the specialist. The volume would make an excellent set of secondary readings for a course on law and the elderly. The demographic materials are fascinating.

The book ends up serving many functions. As indicated, perhaps its most obvious is that of a desk encyclopedia of the issues associated with the elderly in the late twentieth century. Another of its contributions is to show how many of these problems face societies across the globe without regard to political ideology or economic status.<sup>124</sup> Just as interesting are the differences. To read of bridewealth and control of marriageable females as a form of property and social security, past and present,<sup>125</sup> is to be first taken aback by the anachronism and then taken back to stories of nineteenth century utopian communities in the American northeast and to mythic or real tales of their inheritors, late twentieth century Mormon communities in the rural southwest, a little bit of upstate New York transplanted. These tales of lives in the control of others in the pursuit of old age security are distressing, even as history. That patriarchs have resisted change, ineffectually, is not surprising.<sup>126</sup> To control nubile females is to control males as well. A very attenuated version of this is the adoption of young adult males in Japan by prosperous parents of daughters and by others.<sup>127</sup> And one is reminded of Sir Joseph and his courtship of the Captain's daughter in Gilbert and Sullivan's *H.M.S. Pinafore*.

The things that struck me most in this book (a highly personal reaction) were the points made over and over again that family care of the elderly no longer is a really useful tool; that the problems discussed in the book are the problems of women not men; and that neither parents nor children want children to be responsible for the long-term care of the incapacitated elderly. It is a mistaken use of social resources to try to enforce such a duty through litiga-

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122. Of course, as commercial retrenchment in developed nations forces middle-aged persons (read men) to retire at earlier and earlier ages, retirement is no longer the blessing it once was.

123. For instance, I cannot imagine a better piece to begin to think about living wills than Rosettenstein's article. Rosettenstein, *supra* note 77.

124. See Shone, *supra* note 23. "The areas of loss are numerous: death of spouse, relatives and friends; loss of job; loss of status, prestige and participation in society; reduction in income and standard of living; loss of home; loss of health; and loss of liberty." *Id.* at 577. Surely we all face these problems.

I am also struck by the "Alice in Wonderland" quality of many of the pockets of law that affect the elderly. From the nice distinctions of British durable power of attorney law, Farrand, *Enduring Powers of Attorney*, in *AGING WORLD* 637, to the artificial poverty of Medicaid planning, Dobris, *supra* note 25, it seems that Byzantine rules await the unwary elderly, their families and their lawyers. We need a world in which old people do what is economically efficient rather than what is Medicaid-efficient. It seems that elder law has trouble being "easily usable and inexpensive." Farrand, *Enduring Powers of Attorney*, in *AGING WORLD* 637, 641.

125. See Rwezaura, *supra* note 27.

126. See *id.*

127. See Kato, *The Adoption of Majors in Japan*, in *AGING WORLD* 161.

tion.<sup>128</sup> It may be a norm societies aspire to, and governments may try to fool people into thinking there is an enforceable legal duty, but it seems clear to me at the end of the day that modern nations cannot hope to enforce the norm by law. In a sense one sees this in the typical intestate succession statute which makes no provision for parents once an intestate has children.<sup>129</sup>

I find the case against a legal duty to support elderly parents to be a strong one. The arguments include: the societal need to deal with the corrosive parental fear of being a burden;<sup>130</sup> changing expectations about what an adult child's duty is towards parents, given the discussed changes in our society, perhaps best summarized by Maeda: "demographic changes [including older parents and children];<sup>131</sup> decreased capability of families to care for their aging parents, and development of formal support and care services."<sup>132</sup> I do accept the "need to support and/or care for . . . aging parents if . . . [one has] sufficient financial and social capability after having secured a decent life for . . . [one's] own famil[y]"<sup>133</sup> but I am uncomfortable requiring it of people with limited resources. As with all requests of government for funds the question is, should it be means tested or given to all persons across the board? Across the board is always simpler for the dispenser and it tends to make more people happy. It also advantages the prosperous which is usually a politically easier thing for government to do. Of course, one is always suspicious of the principled argument made by the prosperous in favor of giving them money.

One has only to read a list of the government services provided in a developed nation<sup>134</sup> to realize that the thought of the family providing these services borders on the absurd. They are expensive, labor intensive, and require skilled persons. Families do not have the unemployed relatives nor do they usually have the money to provide for the limited, frail elderly. I think there should be compulsory insurance. I think it will turn out that voluntary insurance does not generate enough premium income.

There "is a great gap between attitudes and facts" as Maeda puts it,<sup>135</sup> just as there is a great gap between the law and its enforcement. And there seems to be a gap between the law in theory and the law in practice, just as there seems to be a gap between what people say they want the law to say and what they in fact do themselves. Thus, while laws about filial duty and relative responsibility

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128. Thus we have Gunn speaking of "past attempts to exact filial piety by norms of law." Gunn, *The Development of Laws Relating to Filial Support in Australia*, in AGING WORLD 237, 239.

129. Levy seemingly would argue with much of this. See Levy, *Supporting the Aged: The Problem of Family Responsibility*, in AGING WORLD 253. Many commentators seem to assume that the state should pay for the elderly rather than their children. Compare *id.* All who discuss the idea of children supporting parents fret about the unworthy parent whom the hapless abandoned child is forced to support. (Stojanowska writes of "The problem of the 'unworthiness' of the claimant." Stojanowska, *Support Payments by Children to Their Parents and Welfare Provisions in Poland*, in AGING WORLD 281, 285.) Virtually no one talks of a duty on elderly parents to support adult children. But see *id.* at 283. This is likely partially explicable as recognition of the relative poverty of many old people, and sentimentality about the elderly as well as notions about adulthood and emancipation.

130. See Maeda, *supra* note 33, at 305.

131. Moreover, older parents means older children taking care of them.

132. Maeda, *supra* note 33, at 306.

133. *Id.* at 298.

134. See Graycar, *supra* note 40.

135. Maeda, *supra* note 33, at 304.

exist and are given credence, enforcement and observance are a different matter.<sup>136</sup>

Why do we torment people and seek to make them do what they cannot and leave them without the means to cope?

As Eekelaar points out<sup>137</sup> some of the factors and phenomena discussed in the book, especially demographics, allocation of state resources to the elderly and earning and savings patterns, are playing havoc in industrial nations with the idea of the middle-class inheritance. The middle-class inheritance is discussed at great length and with great insight by Langbein in the *Michigan Law Review*.<sup>138</sup> I also discuss aspects of it in the *Real Property Probate and Trust Journal*.<sup>139</sup>

My observation is that middle-class elderly are giving some of their "excess" savings to younger generations in the form of house downpayments,<sup>140</sup> computers,<sup>141</sup> vacations, charitable gifts and the like. It is nothing new:

After 1929, Chips did not leave Brookfield—even for Old Boys' dinners in London. He was afraid of chills, and late nights began to tire him too much. . . . His faculties were all unimpaired, and he had no personal worries of any kind. His income was more than he needed to spend, and his small capital, invested in gilt-edged stocks, did not suffer when the slump set in. He gave a lot of money away—to people who called on him with a hard-luck story, to various School funds, and also to the Brookfield mission. In 1930 he made his will. Except for legacies to the mission and to Mrs. Wickett, he left all he had to found an open scholarship to the School.<sup>142</sup>

I see the caring middle-class elderly worried about their own well being and also selflessly desirous of helping their children, grandchildren, nieces and nephews, who often need help. Those elderly often make tough choices.

Many commentators conclude that retirement savings should be used up to support the elderly and not protected, or partially protected, as inheritances.<sup>143</sup> Langbein<sup>144</sup> says that, what I will call anticipatory inheritances,<sup>145</sup> are being used preretirement to educate children and I would say that retirement savings are being used to educate grandchildren and get them started in life. Danielsén suggests that because people live longer, few dependent children need their inheritances for support.<sup>146</sup> Agreed, but I say parents want to give it for nonsupport purposes and children want to receive it, and that the transfer has become one of the settled expectations of our society. Moreover, children want inheritances to establish their own children ala Langbein,<sup>147</sup> to substitute for savings

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136. See Levy, *supra* note 129.

137. Eekelaar, *supra* note 10, at 777.

138. See Langbein, *supra* note 90.

139. See Dobris, *Medicaid Asset Planning by the Elderly*, *supra* note 6.

140. I live in a house traceable in part to gifts from my mother, Frances Dobris, and my father-in-law, Charles Wasserberg.

141. I wrote this review on a computer given me by my Aunt Dorothy Lazoroff.

142. J. HILTON, *supra* note 69, at 109-10.

143. See Eekelaar, *supra* note 10.

144. See Langbein, *supra* note 90.

145. In some sense this is Verschraegen's "anticipated succession." See Verschraegen, *supra* note 88. In a sentence, it is the transmission before death, of capital wealth to younger generations.

146. See Danielsén, *supra* note 88.

147. See Langbein, *supra* note 90.

they were unwilling or unable to make, and to provide an ease they have been otherwise unable to obtain in a world where middle-class opportunities are diminishing. Eekelaar seemingly suggests these inheritances, coming as they do to middle-aged people of some "property status," often in the form of residences of engorged value, are frosting on the financial cake.<sup>148</sup> To the extent that "assets have provided the framework for the life of the family,"<sup>149</sup> I believe it is more than frosting we are talking about and the question really is how much of that framework, and under what circumstances, can and should that framework be passed on?

Danielsen suggests that "[s]ociety has an interest that the property the parents have accumulated should pass to the younger generation at a time when they most need it."<sup>150</sup> He goes on to suggest that "[t]he fact that people now live longer means that this [waiting until death] is not a realistic approach."<sup>151</sup> This suggests two things to me. The first is that this is a partial explanation of what Langbein tells us about—people giving away their property to their children for education while the donors are still middle-aged.<sup>152</sup> They are giving their property to their children when the children most need it, which has always been the case.<sup>153</sup> It also suggests to me that industrialized societies might be well advised to truly assure old age to encourage such gifts which are, as Langbein describes, valuable investments in human capital.<sup>154</sup> Of course, keeping the present system of inheritance may have the effect in many situations of directing the inherited assets into the grandchildren's education instead of the children's, or even the great-grandchildren's. Indeed, the capital keg may easily get tapped twice before death—first to educate the children and second to educate the grandchildren.<sup>155</sup> Whatever, it seems quite safe to say that the effect of demographics on inheritance is that the assets inherited "secure the economic circumstances of the children"<sup>156</sup> in a different fashion than those assets once did.<sup>157</sup> And why inheritances should be confiscated to make miniscule additions to the federal fisc eludes me.

148. See Eekelaar, *supra* note 10, at 777.

149. Danielsen, *supra* note 88, at 785.

150. *Id.* at 786. See generally Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. OF ECON. PERSP. 15 (Spring 1988).

151. Danielsen, *supra* note 88, at 786.

152. See Langbein, *supra* note 90.

153. If people are going to give their property away and engage in acts of anticipated succession then this will inevitably bring back into the limelight the doctrines of advancement, satisfaction of general bequests and hotchpot. See Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671 (1984).

154. Langbein, *supra* note 90, at 732-33.

155. After all when does one need capital in middle-class America? To buy a house, to educate children, to set up a household, to retire, to start a business, to seek pleasure through expenditures on travel, durable goods and the like.

One wonders if college inflation is partially traceable to grandparent money in that people are less aggressive consumers because it is not their money? It is probably more likely, in part, a monopoly effect of perceived value of a degree from one of fifty schools allowing them to charge a goodly amount for their services.

156. Danielsen, *supra* note 88, at 786.

157. There is a French practice that is third cousin to Verschraegen's "anticipated succession." It is "[a]nnuity purchase [or] . . . viager (literally 'for life'). [It] is less widespread in France now than it used to be, but it does still exist . . . especially in country areas." Thus one acts to "[a]chat en viager: To buy against an

The entitlement to a meaningful share of the surviving parent's estate has always been there. Now economic and demographic changes and changes in medical technology mean that there are new claims on parental capital, thus threatening the inheritance. Elderly parents and adult children are awakening to the fact that an inheritance may not be there because the parents have outlived their capital in a way that never before was the case. It is a fully matured expectation in America that middle-class savings will have meaning. So a fully matured expectation of an entitlement to an inheritance is in conflict with a Calvinist expectation that people will pay for their own old age. The cost of old age can have the effect of forcing the elderly parent to disinherit her children, something she does not want to do. This is quite different than the general American rule that there is no forced share for children—that one may disinherit one's children if one wishes. The idea that one will inherit one's parents' "fortune" is fully matured in our society. It is the idea that the inheritance may not be there that is recently introduced and not fully matured.<sup>158</sup>

The political consensus about inheritance in the face of expensive long-term care has not yet formed. I dare say some middle ground will be found with both the state and the family contributing and with all old people getting some access to a long-term care benefit. And as was said in another context: "Attitudes as to what constitutes an equitable distribution of the costs and benefits of a public retirement system are ultimately based on value judgments, since neither theory nor empirical evidence are likely to provide objective criteria."<sup>159</sup> And, "a solution through political debate is tedious and time-consuming."<sup>160</sup>

annuity payable to the beneficiary throughout his lifetime." L. DE WARREN & C. NOLLET, *SETTING UP IN FRANCE* 173 (new ed. 1989). See also Verschraegen, *supra* note 88.

It consists in buying a property from an individual or perhaps an elderly couple, not with a lump sum but by regular installments and letting them continue to use the house, or part of it, until their death. Under certain aspects, this may seem immoral, as the person acquiring the house is betting on the quick disappearance of the occupant - on the other hand it is a means for elderly people to have a comfortable income without having to leave their home or uproot themselves in order to survive.

The price obviously depends on the age of the vendor. It is calculated according to an average life expectancy of 70 for a man and 79 for a woman. The older the vendor, the higher the annuity. At the start, the purchaser hands over part of the price in cash (this is called the bouquet) which may be one quarter or one third of the total sum. The rest is divided into annual or monthly payments based on the age of the vendor. If, for example, he is a man of 60, the annuity would be repaid over 10 years or 120 months; for a woman of 50 it would be spread over 29 years or 328 months. If the vendor dies before the age limit, the purchaser will not have to pay the remaining sum. . . .

Another element to be taken into account when calculating the price is the right of the vendor to continue living in part of the house. Sometimes the vendor does not want to stay there for personal reasons, but more frequently he reserves the right to keep a wing or a floor of the house, or even a corner of the garden to grow carrots and lettuces. In this case of course, the rate of payment is lower than if the property had been completely empty.

L. DE WARREN & C. NOLLET, *SETTING UP IN FRANCE* 47-48 (new ed. 1989).

Obviously there is a credit risk for the seller and risks of inflation and deflation for seller and buyer. And one is put in mind of reverse mortgages as well.

158. Cf. Holtzmann, *supra* note 48, at 833. I find the willingness of the middle class to invest in itself most noble these days and I find the idea that it is wrong or unattractive baffling. I am tired of financial assaults on me and mine (which I admit are relatively few and far between, so far) and I am not sure how the sharing of the little we have is to take place when I look at how hard we work (with help from family and friends) to create a modest prosperity and offspring who will do their share for society and the species.

159. *Id.* at 832.

160. *Id.* at 840.



We seek to vindicate more than one objective so that even as we agree on one objective we sacrifice another. Parents should be able to leave their children and grandchildren a nest egg for a variety of reasons. People should pay their bills and save for and pay for their own old age. We must foster capital formation, investment in human capital, protect our credit economy, and encourage the bourgeoisie.

I find myself searching for a theoretical base for the proposition that the state should provide proper care for old people who have children, quality services funded by an insurance mechanism, free of bureaucracy and dreary incompetents and incompetence. I recognize the problems of resource allocation and the claims of the poor, the young, the environment, animal rights, and whatever else the reader wants to toss into the pot. But at the end of the day, I do not see how, as a matter of public policy, we can tolerate a situation where middle-class old people who have worked hard all their lives and their equally hard working middle-aged, middle-class children are faced with a situation they cannot successfully cope with. The middle class is the backbone of the economy and the body politic and to fail to serve them is political and policy insanity.

I would offer this quote from a recent review in the *New York Review of Books*:

What could be the reason for the Russian incapacity for creating civilization? The question is an urgent one. Perhaps it lies in a contemptuous attitude toward the group that serves as a base for civilization: the middle class, which in Russia was given the humiliating designation of *meshchantsvo* (petty bourgeoisie). Russian art and literature not only slighted the *meshchantsvo*, but tried to undermine it by denying it had a moral basis for existence. In Russian culture the petty bourgeois was always the source of philistine values and many social ills. . . . The Russian intelligentsia never seriously fought for sausage for the people, instead it fought for their 'liberation'; and that is being repeated today. Abstract thinking prevailed. The intelligentsia would not agree to less than salvation, and as a result Russia has nothing—neither salvation nor sausage.<sup>161</sup>

I think that the inheritance hopes of adult children are to be given great weight. I say this because when all is said and done, I know of no meaningful substitute for the middle-class willingness to invest in human capital—to invest in their children. And that is how much of the money saved from the maw of long-term care by the elderly is going to be used. I trust the bourgeoisie to do a better job of investing in human capital than the government and that is why I favor government provision of long-term care funds rather than confiscating the savings of the elderly before providing care through Medicaid.

The state provides most of the services that old people require (health services and pensions come to mind). It seems the state should also provide long-term care as well. I realize that becomes a curious mix of statism and capitalism, but so be it. I think it is the world we live in, and, as they say, consistency is the hobgoblin of small minds.

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161. Erofeev, *Neither Salvation nor Sausage*, (Book Review) *N.Y. REV. OF BOOKS*, June 14, 1990, Vol. 37, at 23, 25. See generally, P. JOHNSON, *INTELLECTUALS* (1988).

If I could only take one thing away from this book<sup>162</sup> it would be an idea that has nothing to do with law and the elderly—the best way to get professors to write well is to put them in front of a live, heterogeneous, audience of fellow specialists, give them a relatively short time slot, and publish the results. This book is delightfully free of cant and jargon.<sup>163</sup> It is often a good read. Indeed this volume is so interesting one wonders if it might be that most disdained (and paradoxically, currently most fashionable) of scholastic enterprises—storytelling.

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162. And, if one could read only one chapter, I would say it should be the one by Josef Hoerl. See Hoerl, *supra* note 20.

163. Of course there are exceptions. Thus there is reference to the fascinating term “the third age.” I take it the third age is 60 - 80 and the fourth age is over 80 or old-old. So we learn to live with terms like the third age and old-old and frail elderly and the like. Mladenovic, *supra* note 28, at 153.